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JAMES H. McKENNEY,
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APPELLANT'S BRIEF

Supreme Court of the United States

OCTOBER TERM, 1904

No. ~~283~~ 105.

H. C. HERRICK, A. V. NOYES, CHARLES LABROSSE, LEON LARRIEU, W. S. GRAY and PETER CRANE, Appellants,

vs.

BOQUILLAS LAND & CATTLE COMPANY, Appellee.

On Appeal From the Supreme Court of the Territory of Arizona.

FILED_____

(19,483)

BEN GOODRICH,
Attorney for Appellants.

Supreme Court of the United States

OCTOBER TERM, 1904

No. 383

H. C. HERRICK, A. V. NOYES, CHARLES LABROSSE, LEON LARRIEU, W. S. GRAY and PETER CRANE, Appellants,

vs.

BOQUILLAS LAND & CATTLE COMPANY, Appellee.

BRIEF FOR APPELLANTS.

On Appeal From the Supreme Court of the Territory of Arizona.

STATEMENT OF THE CASE.

This is an action in ejectment brought in the District Court of Cochise County, Arizona, by the Boquillas Land & Cattle Company against the defendants and others to recover possession of 17,355.86 acres of land known as the "Boquillas Land Grant."

Plaintiff, among other things, alleges in its complaint that on the 1st day of January, 1875, the plaintiff, its grantors and predecessors in interest, were, and ever since have been, and now are, the owners of the land; and on the 28th of November, 1900, the defendants entered into the possession of said premises and dispossessed plaintiff, and now unlawfully withhold the possession thereof to its damage in the sum of $10,000.00. Alleges the annual value of the rents, issues and profits to be $10,000.00, and prays judgment for possession and for the damages alleged.

Defendants answering, deny the allegations of the

(Endorsed): Filed June 23rd, A. D. 1902.
Dated this ..... of May, A. D. 1904.

RICHARD E. SLOAN,
Associate Justice, Supreme Court of the Territory of Arizona.

(Trans. of Rec., pp. 66-69.)

ASSIGNMENT OF ERRORS.

Defendants assign for error:

1st. That the Supreme Court of the Territory of Arizona erred in holding and deciding that the record of the District Court of Cochise County on appeal to the Supreme Court of the Territory of Arizona, was insufficient as a basis for any review of the case.

2nd. In holding and deciding that the record from the District Court of Cochise County to the Supreme Court of the Territory presented no matter which said Supreme Court could consider except the one question as to whether the pleadings supported the judgment.

3rd. In holding and deciding that the judgment of the Supreme Court of the Territory of Arizona followed the findings of the District Court of Cochise County.

4th. In holding and deciding that the findings of the District Court of Cochise County that plaintiff and its grantors had been the owners and entitled to the possession of the land sued for since the 1st day of January, 1875, and that appellants have since the 14th day of December, 1900, withheld possession from plaintiff and its grantors, and continued to so withhold the same without specifically finding an ouster of plaintiff by any of the defendants was sufficient to support the judgment.

5th. In holding and deciding that the question whether the evidence was sufficient to establish the ownership of the lands in question in the appellee, and the question whether the appellants had shown

peaceable and adverse possession under the statute of limitations set up in their answer was not presented in the record of the District Court of Cochise County, and could not be considered by the Supreme Court of the Territory of Arizona.

6th. In holding and deciding that no error appeared upon the face of the record presented to the Supreme Court of the Territory of Arizona.

7th. In affirming the judgment of the District Court of Cochise County, and of not reversing the judgment of the District Court of Cochise County, and granting appellants a new trial.

8th. In holding and deciding that the evidence supported the findings and judgment of the District Court of Cochise County.

9th. In holding and deciding that the findings and judgment of the District Court of Cochise County are not against law.

10th. In holding and deciding that the finding of the District Court of Cochise County supports the judgment.

11th. In refusing to hold that there is fatal variance between the findings of fact and conclusions of law.

12th. In refusing to hold that the findings of fact in the District Court of Cochise County are outside of the issues made by the pleadings.

13th. In holding and deciding that the evidence in the trial court below supports the finding that plaintiff was at the commencement of the action, or was at the time of the trial, the owner of every part and parcel of the land described in the complaint.

14th. In holding and deciding that the finding of the District Court of Cochise County that appellants were in possession for ten years prior to the bringing of the action by appellee was insufficient as a bar to appellee's recovery.

15th. In holding and deciding in effect that the

judgment of the court below against the appellants for the rents and profits of the land withheld by them by appellee follows the findings as to such rents and profits.

16th. In holding and deciding in effect that the District Court of Cochise County ruled correctly in refusing to grant appellants a new trial.

WHEREFORE, appellants pray that this Honorable Court examine and correct the errors assigned and for a reversal of the judgment and decree of the Supreme Court of the Territory in all things.

(Trans. of Rec., p. 65-6. Fols. 130-134.)

ARGUMENT.

The Supreme Court of Arizona Territory affirmed the judgment of the lower court on the ground that there was no bill of exceptions and no statement of facts, or transcript of evidence in the record, and that nothing was presented which that court could consider except the one question as to whether the pleadings support the judgment. (Trans. of Record, page 51. Fols. 101-2.)

By section 1464 of the Revised Statutes of Arizona of 1901, it is provided "that where the ruling or other action of the court appears otherwise of record, no bill of exceptions shall be necessary to reserve an exception thereto."

In this case there were findings of fact, conclusions of law and a judgment made by the court, and they certainly are a part of the record in the case and should be considered.

The only purpose of a bill of exceptions is to make something to appear of record, which, without it, would not appear.

> Maricopa County vs. Rosson, 40 Pac., 314.
> Weeks vs. Gold Mining Co., 73 Cal., 603.

And this court has held in the case of County of Apache vs. Barth, 177 U. S., page 542, that it must

examine the findings of fact made by the court of the Territory to ascertain whether they support the judgment, and in Fox vs. Haarstick, 156 U. S., 674, that it would review questions of practice under local law from a Territorial Supreme Court.

The findings then being a matter of record, the question presented is whether or not the conclusions of law made by the Judge of the District Court, are consistent with and supported by the findings of fact, and whether the judgment follows those findings, and is supported by them.

The Supreme Court adopted the findings of the lower court and found, among other things, that on May 8th, 1833, the Mexican Government, by good and sufficient grant, conveyed to plaintiff's grantors and predecessors in interest the premises in controversy.

That on December 14th, 1900, the United States Government, by its patent, recognized and confirmed the validity of said grant by the Mexican Government, and found and decreed that W. R. Hearst and Phoebe A. Hearst had acquired an undivided interest in such lands and premises of the Mexican grantees; that each and every one of defendants were on the 14th of December, 1900, and had been for more than ten years next preceding that date in the occupation of various portions of said lands and withheld possession from plaintiff, and still withholds possession; that plaintiff and its grantors and predecessors in interest have been since January 1st, 1875, and ever since said date and still are the owners and entitled to the possession thereof.

This finding is inconsistent with the finding to the effect that the Government of Mexico conveyed the land as early as May 8th, 1833. The suit was filed August 26th, 1901, so it appears that defendants were in possession, occupying the land adversely and continuously to plaintiff's claim, for about ten and a half years before the suit was filed.

The stipulated evidence is, that the defendants and each of them, their grantors and predecessors

in interest, had been in the actual possession and occupancy of the lands occupied by them for more than ten years continually next before the commencement of this action, and that during all of that time they had never in any manner recognized the title to the lands in controversy to be in plaintiff, or its grantors or predecessors in interest. (Trans. of Record, p. 5. Folio 11.)

In United States vs. Pendle, 185 U. S., 200, and in United States vs. Chaves, 159 U. S., 452, it is held that uninterrupted possession for a period of time required by statute presumes a grant, and that even a fraudulent or wrongful possession does not avoid a statute.

And in Toltec Ranch Co. vs. Cook, 191 U. S., 532, this court decided that the limitation began to run from the completion of the grant (which in this case would be May 8th, 1833), and not from the issuance of the patent. See, also:

Desert Salt Co. vs. Tarpy, 142 U. S., 241.
Joplin vs. Chachere, 192 U. S., 94.

But it is contended by appellee, and was so held by the Supreme Court of the Territory, that the ten years statute of limitations does not apply, for the reason that it is prospective and not retrospective in its effect, and the court cites the cases of Sohn vs. Waterson, 17 Wall., 596; Terry vs. Anderson, 95 U. S., 632, and other cases from the state courts.

It will be remembered that in this case there was more than simple possession for more than ten and a half years. Besides the lapse of time, there were acts done and other circumstances which would warrant the court, as a matter of general jurisprudence, to presume a grant. See:

U. S. vs. Pendle, 185 U. S., 200.
U. S. vs. Chaves, 159 U. S., 452.
1st Greenleaf's 12 Ed., Section 17.

The theory of appellees' case in the court below, was that the statute of limitations began to run only upon the confirmation of the grant by the issuance

of the United States patent. We have seen that this is not the rule.

Toltec Ranch Co. vs. Cook, supra.

But is it true that the ten years statute of limitations of Arizona plead by defendants are prospective only in their effect?

This court in the Sohn case say: "A statute of limitations may undoubtedly have effect upon actions which have already accrued, as well as upon actions which may accrue after its passage. Whether it does so or not will depend upon the language of the act and the apparent intent of the Legislature to be gathered therefrom. When a statute declares generally that no action of a certain class shall be brought except within a certain limited time after it shall have accrued, the language of the statute would make it apply to past actions as well as those arising in the future."

17th Wall., 599.

Paragraph 2938 Revised Statutes of Arizona, 1901, is a statute of precisely this character, and applies to all actions which have accrued prior to the passage of the law as well as those that accrue after its passage, and brings the case at bar strictly within the rule laid down in the Sohn case.

That case, and others relied upon by the Supreme Court of Arizona, lays down the rule that is applicable where the Legislature has undertaken to shorten the period fixed by a previous statute of limitations without giving the party complaining a reasonable time within which to bring his action.

Here no vested rights were impaired or interfered with, and the question of unreasonableness of time cuts no figure. To the same effect is Terry vs. Anderson cited, supra, and that it is competent for the Legislature to pass such laws is settled by numerous authorities.

Jackson vs. Lamphire, 3 Peters, 280.
Freeborn vs. Smith, 2 Wall., 174.

complaint, and allege possession in them and in their predecessors in interest for more than twenty (20) years prior to the beginning of the suit within the boundaries of the land described in the complaint continually down to the filing of the answer, and allege uninterrupted, sole, exclusive and actual seizing and possession of said premises, and every part thereof, claiming to have and hold same as sole and exclusive owners in fee simple, and that during the whole of that time they have been in the sole and exclusive receipt and enjoyment of the rents, issues, profits, etc., claiming to be of right entitled to receive and enjoy the same, and without having paid over or accounted for to the plaintiff or any person under whom it claims to derive title for any part of such rents, issues, profits, etc., and without having at any time or manner possessed said premises, or any part thereof, or any rents, issues or profits arising out of the same in common with or as trustee for plaintiff, or any other person under whom it claims to derive title, and without ever having acknowledged or admitted that defendants, or either of them, were bound in law or equity to pay over or account for any such rents, issues and profits to plaintiff, or any one under whom it claims title. (Trans. of Record, pages 1 and 2, Fols. 1 to 4.)

The answer also sets up that during the time they were in possession, they had reclaimed portions of said land from waste to arable, constructed ditches for the conveyance of water for irrigating purposes, built dwelling houses, barns and outhouses, and placed improvements upon each parcel owned and possessed by them respectively of over the value of $70,000.00. That the occupancy and possession and claim of ownership of said land and premises during all of said time, were well known to plaintiff and its grantors and predecessors in interest, and that no demand was ever made by it or them upon defendants, or either of them, or their grantors in interest, for the possession of said land and premises, or for the rents, issues and profits of same.

The defendants further plead as a defense to the

action the five, three and two years statute of limitations of the Territory of Arizona. (Trans. of Record, pages 2 to 4, Fols. 4 to 8, inclusive.)

The case was tried to the court without a jury, and the court made its findings and rendered judgment in favor of plaintiff for the land described in its complaint, and for various sums of money as rental against the said several defendants. (Trans. of Record, pages 7 to 12. Fols. 15 to 26, inclusive.)

The defendants moved for a new trial on the grounds that the evidence does not support the findings and judgment; that said findings and judgment are against the law; that the court erred in rendering judgment in favor of plaintiff and against defendants; that the court erred in not rendering judgment for defendants; that the findings do not support the judgment entered. (Trans. of Record, page 4. Fol. 8.)

The motion was denied by the court, and stay of execution for sixty days granted, and notice of appeal given to the Supreme Court of the Territory in open court as required by statute. (Trans. of Record, page 7. Folio 14.)

The judgment of the District Court of Cochise County was affirmed by the Supreme Court of the Territory. (Trans. of Record, page 51. Fols. 100 to 104, inclusive.) Defendants filed a petition for rehearing, which was granted. (Trans. pages 53 to 59. Fols. 105 to 118, inclusive.) And the case was again affirmed by the Supreme Court of the Territory, and is now brought to this court on appeal for its decision. (Trans. pages 59 to 63. Fols. 119 to 128 inclusive.)

IN THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

Statement of Facts in the Nature of a Special Verdict on Appeal to the Supreme Court of the United States:

Title of Court and Cause.

The Supreme Court of the Territory of Arizona being in regular session and hearing the above entitled cause on appeal from the District Court of the Second Judicial District of the Territory of Arizona in and for the County of Cochise, makes and certifies the following statement of facts of said case in the nature of a special verdict.

The findings of fact are as follows:

This cause coming on regularly to be heard on the ..... day of June, 1902, before the court sitting without a jury (trial by jury having been expressly waived by the respective parties), Messrs. English & Bowman appeared as attorneys for the plaintiff, and Ben Morgan, Esq., appeared as attorney for the defendants answering, others of the defendants having defaulted and others thereof having filed their disclaimers herein; the case proceeded to trial; witnesses were duly sworn and testified, and documentary evidence introduced and filed for and in behalf of the respective parties; and the evidence being concluded the cause was argued by respective counsel, and submitted to the court for its consideration and decision. Whereupon, the court took the matter under advisement, and now, on this the 23rd day of June, 1902, the court being fully advised as to the law and the evidence aforesaid, finds the following facts:

That all of the defendants named and mentioned in the plaintiffs's complaint herein were personally served with summons and complaint herein, within this Cochise County; and that the premises, the subject of this suit, are situated within this Cochise County; that the defendants, James Herrick, P. A. DeMartini, Elijah Clifford, Antonio Zamora, George G. McGee,

Carmen Zamora, Frank Wild, Ben Heney, P. A. DeMartini & Co., have filed disclaimers herein to the property sued for, and each and every part and portion thereof, and that the defendants, Frank Joeger, Charles La Brosse, Leandro Rodriguez, Miguel Valenzuela, Dolores Padia, Carmen Zamora, Nicanoro Ochoa, A. V. Noyes, H. C. Herrick, Kate Harrington, Peter Crane, Joseph Curtis, Samuel Curtis, W. S. Gray, Leon Larrieu, Wong Fook Ling, Charley Wong, filed their answers in writing herein, and that all of the other defendants herein, not so disclaiming or answering, have failed to appear and answer plaintiff's complaint, their default for not so appearing or answering was duly entered, after their time for so doing had long since expired.

That for more than one year last past, the plaintiff has been, and still, and now is a corporation duly organized and existing under and by virtue of the State of California, authorized to do business and doing business in Cochise County, Territory of Arizona, and having a duly authorized legal agent residing therein.

That on the 8th day of May, A. D. 1833, the Mexican government, by good and sufficient grant, conveyed to plaintiff's grantors and predecessors in interest the lands and premises herein described, being the lands and premises in controversy.

That on the 14th day of December, in the year of our Lord one thousand nine hundred, the Government of the United States, by its letters patent, recognized and confirmed the validity of the said grant of lands in plaintiff's complaint, and hereinafter particularly described, to Ygnacio Elias Gonzales and Nepumoceno Felix, and to their heirs, successors in interest and assigns forever; and found and decreed that W. R. Hearst and Phebe A. Hearst had acquired an undivided interest in such lands and premises of the said two grantees.

That on the 3rd day of July, 1901, the said W. R. Hearst and Phebe A. Hearst, by deed in writing, conveyed all of their said interest in and to the said

lands and premises to the plaintiff herein, and that plaintiff has not since disposed of its title so acquired, or any part thereof, to said lands and premises.

That each and every one of said defendants in this cause were, on the 14th day of December, 1900, and had been for more than ten years next preceding that date, occupying various portions of the said lands and premises, and each and every one of said defendants who so answered herein, and also those of said defendants who have failed to appear and answer herein, have since the last named date withheld possession of divers portions of said lands and premises from the plaintiff and its grantors and predecessors in interest, and still and now, so withhold the same; that since the said December 14, 1900, the annual value of the rents, issues and profits of that part of said lands and premises so withheld from plaintiff, by the said defendants, is as follows, to-wit:

By the defendant, Charles LaBrosse, the sum of	$400.00
By the defendant, A. V. Noyes, the sum of	400.00
By the defendant, Peter Crane, the sum of	450.00
By the defendant, W. S. Gray, the sum of	500.00
By the defendant, H. C. Herrick, the sum of	700.00
By the defendant, Frank Joeger, the sum of	100.00
By the defendant, Leon Larrieu, the sum of	50.00

And now, as conclusions of law, from the foregoing facts, the court now hereby finds and decides that this court has jurisdiction of the parties and subject matter herein.

That all the material allegations of the plaintiff's complaint are sustained by evidence free from objection as to its competency, relevancy, admissibility and sufficiency, except as limited by the facts especially found herein.

That plaintiff and its predecessors and grantors in interest have been since the first day of January, 1875, and ever since has been, and still is, the owner and entitled to the possession of the lands and premises in plaintiff's complaint, and hereinafter particularly described, and each and every part or portion

thereof. That none of the defendants are entitled to possession of said lands and premises, or any part or portion thereof, and that plaintiff is entitled to the immediate possession of the whole of said lands and premises, and to a writ of possession thereunder; and also to its cost herein expended, hereby taxed at ..... Dollars, which costs shall be taxed against all of the defendants, except those who have filed their disclaimers herein, and plaintiff shall also have judgment for the rents, issues and profits of said premises in accordance with the facts as found herein, for all of which let judgment be entered, and the appropriate writ of possession and writ of execution issue.

The said lands and premises in the complaint herein mentioned and described, and hereinbefore referred to, are described as follows, to wit:

That certain grant of land known as, designated and called the San Juan de los Boquillas y Nogales, situated in Cochise County, Territory of Arizona, the exterior boundaries of which are as follows: Beginning at the initial monument number one, about one mile east of the New Mexico and Arizona Railroad bridge, which crosses the San Pedro river at the town of Fairbank, in said County, and running thence north fifteen degrees thirty-nine minutes West 27,286 feet to a rock chiseled Δ 2; thence north 1 deg. 58 min. east 12,655 feet to a rock chiseled Δ 3; thence north 88 deg. 2 min. west 10,090 feet to a corner rock chiseled Δ 4; thence south 1 deg. 58 min. west 14,201 feet to a rock chiseled Δ 5; thence south 15 deg. 39 min. east 28,340 feet to a rock chiseled Δ 6; thence south 10 deg. 2 min. east 33,434 feet to a rock chiseled Δ 7; thence north 79 deg. 58 min. east 10,090 feet to a rock chiseled Δ 8; thence north 10 deg. west 33,927 feet to the place of beginning, and containing 17,355.86 acres of land, be the same more or less.

Dated this June 23rd, A. D. 1902.

FLETCHER M. DOAN, Judge.

GEO. B. WILCOX, Clerk.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1905.

No. 105.

H. C. HERRICK, A. V. NOYES, CHARLES LABROSSE, LEON LARRIEU, W. S. GRAY, AND PETER CRANE,
APPELLANTS,

vs.

BOQUILLAS LAND AND CATTLE COMPANY,
APPELLEE.

BRIEF FOR APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

FRANCIS J. HENEY,
Attorney for Appellee.

SUPREME COURT OF THE UNITED STATES.

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H. C. HERRICK, A. V. NOYES, CHARLES LABROSSE, LEON LARRIEU, W. S. GRAY, AND PETER CRANE, APPELLANTS,

vs.

BOQUILLAS LAND AND CATTLE COMPANY, APPELLEE.

BRIEF FOR APPELLEE.

ON APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

The case is accurately and fully stated in the original opinion of the supreme court of the Territory, which appears on pages 51 and 52 of the Transcript of Record on Appeal, supplemented by its opinion upon rehearing, which appears upon pages 59 to 62 of the same record.

It is deemed unnecessary to add anything upon the points discussed by the supreme court of the Territory in its opinion which was rendered upon the rehearing.

In addition, however, to the points there disposed of, the following are respectfully suggested for the consideration of this court:

Prior to September 1, 1901, there were three classes of cases only in which adverse possession could be successfully pleaded or proven in an action of ejectment, to wit:

1. Where the defendant relied upon two years' possession ONLY as against prior right of possession ONLY on the part of the plaintiff.

2. Where the defendant relied upon adverse possession under "TITLE" or "COLOR OF TITLE" for a period of three years. Under this section of the statute a chain of title from the sovereignty is required, and it is not pretended that any facts tending to show such chain of title were offered in evidence on part of defendants, or that any such facts were found by the trial court.

3. Adverse possession by the defendant for a period of five years under a deed duly registered, coupled with payment of taxes (if any levied) for the same period of time.

It is not pretended that any evidence was offered tending to show that any of the defendants claim under a deed duly registered, or that any taxes were paid on any of said land by any of said defendants, or that taxes were not levied upon any of such lands during the time said defendants claim to have occupied the same adversely to plaintiff.

The rule is that all of the incidents of the statute must concur and be continuing in connection for the time prescribed in order to complete the bar of the statute and the right conferred thereby (Converse *vs.* Ringer (Texas, 1894), 24 S. W. Rep., 705).

Moreover, section 2304, Revised Statutes of Arizona, 1887, provides that—

"'Adverse possession' is an actual and visible appropriation of the land commenced and continued under a claim of right INCONSISTENT WITH AND HOSTILE TO THE CLAIM OF ANOTHER,"

and the omission of the words "adverse" and "continuous" from the finding in relation to ten years' occupancy of the land by defendants makes that finding absolutely insufficient to overturn the judgment, for the reasons stated in the case just cited and the further reasons stated in the case of Leon and H. Blum Land Co. *vs.* Rogers (court of civil appeals, Texas, October 10, 1895), 32 S. W. Rep., 713).

In the last-mentioned case the court reconsidered the doctrine laid down in Converse *vs.* Ringer upon the question of what constitutes "adverse" possession where the occupant entered and continued to hold during his occupancy under the erroneous belief that the land was a part of the public domain, and, among other things, the court said:

"To hold that one who enters upon land and holds possession thereof with the intention to acquire title to it from the owner (the Government), as was done by Rogers, is one who 'enters and holds under a claim of right inconsistent with and hostile to the owner,' would be paradoxical."

Rogers had entered upon the land under the erroneous belief that the land was owned by the State of Texas and had never been severed from the public domain.

On this point the court further said:

"But it is said, the occupant being mistaken as to the owner of the land his possession is hostile to the claim of all others save him whom he erroneously supposed was the owner. To reach this conclusion we must presume that had the occupant known the land was not public domain he would have entered and held possession under a claim of right in hostility to the owner. But the law indulges in no such presumption. On the contrary, he who asserts title to land under the statute of limitations can only establish his claim by competent and adequate evidence of a compliance with all the requirements of the statute."

And section 1352 of the Revised Statutes of Arizona, 1901, provides that—

"A defect of parties is waived if it is not pleaded in the answer or taken advantage of by demurrer."

Under the liberal statutes authorizing amendments the defendants could have amended their answers after all the evidence was in so as to take advantage of any defect of parties if the plaintiff is not the owner of the entire fee or is not entitled to maintain this action alone, and the failure of defendants to do so prevents them from raising the question for the first time in this court. They could only have raised it in the trial court by first asking permission to amend their answer in this respect.

Respectfully submitted,

FRANCIS J. HENEY,
Attorney for Appellee.

Campbell vs. Holt, 115 U. S., 625.
McFadden vs. Evans, Snider-Buel Co., 185 U. S., 513.

Besides in this case the fact the plaintiff stood by from 1833 and allowed the defendants to go upon the land and change it from a desert to an arable condition, and to improve it for a number of years, shows that plaintiff has been guilty of unpardonable laches, and should not be permitted to recover against the defendants. In such cases the courts apply the doctrine sua sponte, even though the laches are not pleaded or the bill not demurred to.

Penn Mutual Life Ins. Co. vs. Austin, 168 U. S., 697, and cases there cited.

Subdivision 7 of Section 13 of Act of March 3rd, 1891, establishing the court of private land claims, provides: "That the land court should not confirm any claims for land which was not complete and perfect at the time of the transfer of the sovereignty wherein the land is situated to the United States; and in Sena vs. U. S., 189 U. S., 233-242, this court held, that if the grant was a complete and perfect title, the remedy of the claimant was in the Territorial Court.

Appellee, in its brief in the Supreme Court of the Territory, claimed that until the Court of Private Land Claims there was no court within the Territory of Arizona which had jurisdiction to entertain a suit in ejectment based upon a Mexican title to land, even though such title was complete and perfect at the date of the Gadsden Treaty. This question has been decided adversely to that contention in U. S. vs. Martinez, 184 U. S., 444, and in U. S. vs. Conway, 175 U. S., 62.

Appellants contend that under the findings and stipulated evidence in this case, that appellee never did prove title to the property.

The only evidence of title in plaintiff was the patent issued by the United States to the heirs of Ygnacio Elias Gonzales and Nupumoceno Felix, their heirs, successors in interest and assigns, confirming

the Mexican grant made in 1833, and a deed from Phoebe A. Hearst and William R. Hearst to the plaintiff in the case. The patent copied the decree of the Land Court and recited, among other things, that the Rancho San Juan de las Boquillas y Nogales was presented by petition of Phoebe A. and William R. Hearst to Court of Private Land Claims for confirmation, and recited further that claimants acquired an undivided interest in and to said lands described in the grant, by conveyances executed to them by heirs at law of the original grantees hereinbefore named.

It is respectfully submitted to this court that recitations in a judgment between the United States and land grant claimants could not affect, under the very terms of the Act of March 3rd, 1891, persons who are in no way connected with that suit, and could not bind them.

Subdivision 5 of Section 13 of that Act, provides: "That no proceeding, decree, etc., under the Act, shall conclude or affect the private rights of persons as between each other, but shall be conclusive of the rights between the United States and all other persons claiming any interest, etc., in such lands."

Section 8 of the Act provides: "That the act of confirmation of a Mexican or Spanish grant, shall not affect any conflicting or private interest, etc.," and further provides: "That no confirmation shall have any effect other than as a release of all claim of title by the United States."

Subdivision 7 of Section 13 provides, that the Private Land Court shall not allow * * * a private title unless it was perfect at the time of the transfer of the sovereignty to the United States.

In the case of Sabariego vs. Maverick, 124 U. S., pages 283-284, the question of the effect of recitals in judgments is fully discussed and the maxim upon which the rule is founded, "ominia proesumuntur rite esse acta," is thoroughly examined. And the court, quoting from Best, in his Treatise on Evidence, says: "That the true principle intended to be as-

serted by the rule seems to be that there is a general disposition in courts of justice to uphold judicial and other acts rather than to render them inoperative, and with this view, where there is general evidence of facts having been legally and regularly done to dispense with proof of circumstances strictly speaking essential to the validity of those acts, and by which they were probably accompanied in most instances, although in others the assumption may rest upon grounds of public policy. Nowhere is the presumption held to be a substitute for proof of an independent and material fact."

The recital in the judgment in the Court of Private Land Claims that the Hearsts had an interest in the grant as against the United States, certainly does not prove that they have any title as against these defendants.

The question between these defendants and the Hearsts was not tried in that case. They were not parties or privies to the judgment, or privies in estate or in law, but were strangers, and claimed by title paramount to the patent. Recitals of this kind, say the court in the case last cited, do not bind persons claiming by an adverse title or persons claiming by title anterior to the date of the reciting deed.

It is respectfully submitted that the case should be reversed and new trial be granted to appellants.

Respectfully,

BEN GOODRICH,

Attorney for Appellants.